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FEBRUARY 6. 1790.

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ANS.—Col. ALEX. STEWART and others, }
TO THE
PET. and COMP. for LORD DAER. }

ALEXANDER YOUNG, W. S. Agent.

A N S W E R S

F O R

Colonel ALEXANDER STEWART of Cairn, ANDREW M'DOWAL of Culgroat, Esq. the Honourable KEITH STEWART of Corfewell, and others, Freeholders of the County of Wigton.

T O T H E

PETITION and COMPLAINT of the Right Honourable BASIL WILLIAM DOUGLAS, commonly called Lord DAER, eldest son of the Right Honourable Dunbar Earl of Selkirk.

ALTHOUGH the freeholders thought it unnecessary to enter in their minutes the reasons which induced them to reject the complainer's claim for inrolment, the respondents did expect, that when the Noble Lord preferred his complaint to your Lordships, he would have at least

least stated something in the way of argument, in support of his claim, especially as he could not fail to know, that for upwards of these fourscore years past, not a single instance has occurred of the eldest son of a peer attempting to assume or exercise the privilege of a freeholder; that only two or three instances of a similar attempt are to be found in the records of this country, since the representation of the lesser barons took place, in consequence of the act of the 11th parliament of James VI. of Scotland, *cap.* 114.; and that not one of these attempts was crowned with success. This striking circumstance might have at least created an apprehension in the mind of the noble Lord, that his endeavouring to come forward as a freeholder would, on the first blush of the case, be considered as not perfectly consistent with the constitution of this part of the united kingdom, and convinced him of the propriety of stating some reasons to your Lordships for his being of a different opinion from that which has been generally received for so long a tract of years. Had that plan been followed in the complaint, the respondents should have considered it to be their duty to enter very fully into the merits of a question of so much importance to all of their rank and order in the State. But since his Lordship has chosen to commence hostilities, without even publishing a manifesto, the respondents humbly apprehend, that it would be improper in them to trouble your Lordships with much argument at present; and that it will be more becoming to confine themselves in these answers to a few observations.

No one who is the least versant in the history of Scotland can be ignorant, that anciently it was the duty of every person who held *in capite* of the crown, to attend in the King's Great Council or Parliament; and that although representatives from boroughs were introduced at a more early period, yet prior to the act 1587 above taken notice of, there were no such persons known in the Parliament of this country as representatives of counties, or, as they were commonly called, commissioners from shires. It is true indeed, that in 1427 James I. who had received his education in England, seems to have intended to put the Parliament of Scotland upon the same

same footing with the English Parliament, not only by the introduction of representatives of counties, but by rendering the commons a separate house. It is, however, evident, that no part of the statute which passed on that occasion, met with much regard. The small barons neglected to elect commissioners, and were of course still bound to give personal attendance, under the exception of those who were possessed of very small estates, and whose presence was dispensed with by particular statutes.

Prior therefore to the act 1587, there was no such thing known in the Parliament of Scotland as an elective seat, except amongst the Commissioners sent by the royal boroughs. All who held landed property of the Crown, were equally entitled to come forward in the Great Council of the nation, without distinguishing between peers and commoners, or between the greater and lesser barons; and in like manner all except those whose estates were within 100 merks of new extent, were equally bound to attend.

In those days, therefore, the eldest sons of Peers who were possessed of landed property holding of the Crown in their own right, stood upon the same footing in this respect with the Peers or greater barons on the one hand, and with the lesser barons or commoners on the other; and they are accordingly to be met with in the rolls of fundry parliaments prior to the year 1558. But although between the 29th of November in that year and the 15th of September 1628, there are on record rolls of ten different parliaments, and there are also on record full rolls of every parliament held from 1633 down to 1706 inclusive; yet none of these rolls contain a single entry of the eldest son of any Peer sitting in parliament either alone or along with his father.

No attempt indeed appears to have been made by the eldest son of a Peer to obtain a seat in parliament as a commissioner from a shire prior to the Union. And that such an attempt, if made, would have met with an immediate check, is evident from a resolution of Parliament of the 23d of April 1685. The eldest son of Sir George M'Kenzie had been chosen one of the commissioners for the shire of Ross in the parliament held in that year. But as the father was created a peer under
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the title of Viscount of Tarbet; by letters patent dated 15th April 1685, a warrant issued at the very first meeting of the parliament for an election of a new commissioner in the son's place. The minute or resolution to that purpose is thus entered in the records: " In respect the Viscount of Tarbet's
 " eldest son, elected one of the commissioners for the shire of
 " Ross, by reason that his father is nobilitate, cannot now re-
 " present that shire, warrant was given to the freeholders of
 " that shire to meet and elect another person in his place."

Another attempt made by the eldest son of a peer in 1689, to represent a borough in the convention of estates, proved equally unsuccessful, as appears from the following resolution likewise to be found in the records: " Edinburgh, 18th
 " March 1689. The meeting of the estates having heard the
 " report of the committee for elections, bearing, that in the
 " controverted election for the borough of Linlithgow, in fa-
 " vour of the Lord Livingston and William Higgins, it is the
 " opinion of the committee that William Higgins's commis-
 " sion ought to be preferred, first, in regard of the Lord Li-
 " vingston's incapacity to represent a borough, being the eld-
 " est son of a peer, secondly, in respect William Higgins was
 " more legally and formally elected by the plurality of votes
 " of the burgeses; they have approven and approves the said
 " report in both the heads thereof, and interpones their au-
 " thority thereto."

By the act of the parliament of Scotland 1707, cap. 8. it was enacted, " That none shall be capable to elect or be elected to
 " represent a shire or borough in the parliament of Great Bri-
 " tain, for this part of the united kingdom, except such as are
 " now capable to elect or be elected as commissioners for shires
 " or boroughs to the parliament of Scotland." And hence it fol-
 " lows that the question how far the eldest sons of peers were
 " entitled to represent a Scottish shire or borough in the parlia-
 " ment of Great Britain, must have depended upon the law
 " and constitution of the parliament of Scotland in that re-
 " spect.

This question came accordingly very soon to be tried; for
 at the general election for the parliament held in 1708, Peers
 eldest sons were returned from several shires and boroughs
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in Scotland. Against these returns petitions were preferred to the House of Commons ; and in a petition from a number of the freeholders of the county of Aberdeen, for which Lord Haddo, the eldest son of the Earl of Aberdeen, had been elected, it was strongly urged, that the allowing a precedent of that kind would not only render the freeholders subservient to the nobility, but likewise sensibly affect the very being and constitution of a British House of Commons, by bringing the representation for Scotland into the hands of a numerous and powerful peerage. The petitions being taken under the consideration of the House of Commons, and a motion being made, and the question put, " That the eldest
 " sons of the peers of Scotland were capable, by the laws of
 " Scotland at the time of the Union, to elect or be elected as
 " commissioners for shires or boroughs to the Parliament of
 " Scotland ; and therefore, by the treaty of Union are capable
 " to elect or be elected to represent any shire or borough in
 " Scotland to sit in the House of Commons of Great Britain
 " it passed in the negative."

Since that time, the attempt has not been renewed. On the contrary, it has been the constant practice, as often as the representative of a county or district of boroughs in Scotland became during the course of a parliament the eldest son of a peer, to issue a writ for electing a new member in his place. Several instances of this are to be found in the journals of the House of Commons. But it will suffice at present to mention the case of Lord Elcho, who, upon his father's succeeding to the title of Earl of Wemyss, not only vacated his seat in Parliament, but was also struck off the rolls of freeholders in different counties in Scotland.

It is true, that the question immediately before your Lordships, is not whether the complainer can represent the county of Wigton in Parliament or not ; but whether or no the freeholders of that county are entitled to object to his being admitted upon their roll. It must however be unnecessary to waste time in proving, that, except those who are disqualified by particular statutes from being elected members of parliament, but not from voting in such elections, no person who is not eligible to that important trust, has any right to come

upon the roll of freeholders. The right to elect, and a right to be elected, have indeed ever been considered as co-ordinate with the single exception already alluded to; and consequently, all those who by the constitution and common law of parliament are ineligible, must also be disqualified from a right to vote, and of course have no title to be admitted on the freeholders rolls. The electors and the elected are accordingly put upon the same footing in the above quoted resolution of the House of Commons, in the case of Lord Haddo, which expressly declares, that the eldest sons of the peers of Scotland were incapable to *elect* or *be elected* to represent any shire or borough in Scotland.

The respondents having thus shewn, that no instance is to be found in the records of parliament, of a peer's eldest son representing a county in Scotland since such representation first took place, and that every attempt of that kind has been successfully resisted; it must be unnecessary for them to trouble your Lordships farther at present, than to observe, that the uninterrupted practice and understanding of so many ages must of itself be sufficient to settle every constitutional point of this kind.

In respect whereof, &c.

A L E X. W I G H T.